



EMAIL BULLETIN

PERM: FASTER DOES NOT MEAN BETTER

4 June 2002

In 1999, the Department of Labor introduced the proposed development of a new Labor Certification program called Program Electronic Review Management System, or "PERM." The program was conceived in an effort to provide a faster, more efficient alternative to the lengthy Regular Track and Reduction in Recruitment Labor Certification processes. Although PERM was first introduced with a projected start date of April 2001, subsequent delays have led to the indefinite postponement while various funding, technology, logistics, and regulatory issues could be vetted and resolved. Although the date of implementation remains uncertain, the proposed DOL regulations, first published in the Federal Register on August 25, 2000, provide insight into the basic structure and requirements we may anticipate in the final PERM program. Subsequent notice and comment periods have led to further modifications of the program. As a result, while the precise requirements have yet to be published, it is anticipated that PERM could be more restrictive than the existing Labor Certification programs.

One of the principal ways that PERM will differ from both Regular Track and Reduction in Recruitment labor certification programs is the manner of filing, which will be electronic, and the time frame for adjudication, which could be as little as 21 days. Only cases specifically selected for audit will result in issuance of an "audit letter" requiring submission of supporting documentation. Cases may be selected for audit for quality control purposes or due to application information requiring further examination by an adjudicator. Other applications will be approved based on the employer's attestation under penalty of perjury that the employer has complied with all regulatory requirements. Failure to respond to an audit letter may lead to a presumption of fraud and the debarment of the employer from filing any additional PERM Applications for Alien Employment Certification for a period of two years.

Recruitment

Under the PERM program, pre-filing recruitment will be required. Proposed regulations specify a six-month recruitment period, during which the employer must utilize multiple sources of recruitment. Some of the sources are mandated by regulation, while others are optional recruitment sources from which the employer must select.

Mandatory Recruitment for Professional Occupations

For positions which require experience or an advanced degree, the employer will be required to place one advertisement in a professional journal and one advertisement in the

Sunday edition of the newspaper. The newspaper must be one of general circulation appropriate to the occupation and the workers likely to apply for the job opportunity in the geographic area. For other professional positions, the employer will be required to place two advertisements, both of which would be in the Sunday edition of the newspaper of general circulation. These advertisements must be spaced at least 28 days apart and must be between 180 days and 30 days prior to the PERM filing. Current labor certification requirements do not specify the precise timing and spacing of the advertisements within the six-month recruitment period and do not require "Sunday ads" or advertisements in professional journals.

In addition to the mandatory advertisements, the PERM regulations propose to require employers to place a job order with the State Workforce Agency serving the geographic area of employment. Presently, this requirement exists only for supervised recruitment during the Regular Track Labor Certification process.

Alternative Recruitment for Professional Positions

In addition to the mandatory advertisements and the job order with the State Workforce Agency, PERM would require additional recruitment methods. The employer would be required to select three methods of recruitment from an approved list that includes job fairs, internal web sites, job search web sites, professional recruiters, or through trade or professional organizations. Existing Labor Certification programs accept these forms of recruitment but do not specifically require any of them.

Recruitment for Nonprofessional Positions

Like professional positions requiring only a bachelor's degree and no experience, nonprofessional positions under PERM will require mandatory recruitment in the form of a job order with the State Workforce Agency and two newspaper advertisements, all of which must occur between 180 days and 30 days prior to filing the PERM Application.

Content of Advertisements

Under the present Reduction in Recruitment Labor Certification Program, advertisements contain minimal content, often only the employer's name, contact information, and the title of the position under recruitment. Under PERM, the advertisements must also provide a job description, its geographic location, job requirements, and the salary/wage rate. Because the salary or wage rate must be included in the advertisements, it will be critical to determine, prior to running the scheduled advertisements, that the proposed rate is adequate to meet or exceed the prevailing wage rate determined State Workforce Agency. Should the offered wage be determined to be lower than the required prevailing wage rate, the mandatory advertisements for the six-month recruitment period would no longer be valid to support the PERM filing.

Prevailing Wage Rate

As with present Labor Certification programs, under PERM, the employer will be required to meet certain prevailing wage requirements. However, PERM will require payment of 100% of the determined prevailing wage rather than the 95% which employers may now agree to pay under existing programs.

Job Requirements

PERM, like existing programs, disallows unduly restrictive or excessive job requirements; however, under PERM, "business necessity" may not be an acceptable justification for requirements which would otherwise be considered unduly restrictive. This proposed change could affect the ability of employers to obtain certification for some unique positions which, due to the particular needs of the company, require qualifications exceeding those that are normal in the industry for a particular position.

Range of Occupational Classifications Narrowed

The current DOL employment classification system used in adjudicating Applications for Alien Employment Certification contains a wider range of job titles and job descriptions than will exist under PERM. Because PERM essentially collapses many positions into fewer, the resulting classifications and job descriptions and requirements are more generic. This will likely affect the specificity with which an employer may differentiate positions. Employers may be unable to include job-specific duties and requirements which are not common to the group of positions which have been narrowed into one under PERM. This could lead to a determination that a position's true normal requirements are actually unduly restrictive and excessive, and thus to a denial of the PERM application in cases where an approval would be likely under existing Labor Certification programs.

Documentation Requirements

Under PERM, an attestation-based program, an employer would be required to provide documentation to support the employer's attestations in the event of an audit. Because employers will have only 21 days to respond to an audit letter or seek an extension of the response time, employers will need to collect and maintain all necessary documentation, including all recruitment results and correspondence with applicants, from the beginning of the recruitment process until certification is obtained.

Qualified Applicants

One of the most disturbing aspects of the PERM program in its proposed form is the regulatory provision which would prohibit the employer from disqualifying a U.S. applicant who meets most, but not all, of the employer's stated requirements.

1. Under PERM, U.S. workers would be considered qualified if they would be able, by education, training, or a combination thereof, to perform the duties of the occupation, in the normally accepted manner.
2. Further, U.S. workers would be considered qualified if they would be able to acquire, during a reasonable period of on-the-job training, the skills necessary to perform the occupational duties as customarily performed by other workers similarly employed.
3. Finally, rejection of U.S. workers based on lack of familiarity with an ancillary job duty would not be permitted.

This standard for disqualification of applicants is far more stringent than in existing Labor Certification programs and could lead to the denial of far more Applications than in the past.

Further Updates

As always, Tindall & Foster, P.C. will provide additional updates when new information becomes available regarding the timing of PERM implementation and the content of proposed PERM regulations.

Tindall & Foster, P.C.

600 Travis, Suite 2800
Houston, Texas 77002 USA
Telephone: (713) 229-8733
Fax: (713) 228-1303
info@tinfallfoster.com

100 Congress, Suite 1500
Austin, TX 78701 USA
Telephone: (512) 478-9475
Fax: (512) 494-8066
info@tindallfoster.com

Informational Website: www.tindallfoster.com
