



## **The Labor Certification Application / PERM process**

This memorandum describes the procedures to apply for labor certification. With very limited exceptions, employers sponsoring individuals for permanent residence must obtain certification from the U.S. Department of Labor (DOL) establishing that the employment in question will neither displace qualified American workers, nor adversely affect wages and working conditions at the work-site.

The method for applying for labor certification is - Program Electronic Review Management (PERM). There is no government filing fee.

### **Initial Considerations**

The labor certification process is a recruitment process that is supervised by the DOL in which the employer must make a good faith effort to locate a qualified U.S. worker for the job. It is important to note that the DOL has broad discretion in adjudicating labor certification applications, and the employer's failure to follow any of the procedures described herein could result in the denial of the application. The DOL will not approve a labor certification if it determines that a qualified U.S. worker (one who meets the minimum requirements for the position as set forth by the employer) was rejected for the position.

The first step is to determine the position to be certified, the location of the job and the minimum requirements for that position. The DOL will scrutinize any requirements for the job that seem overly restrictive or tailored to match the qualifications of the foreign national. For example, the DOL will closely examine foreign language requirements and other requirements that are outside the norm. Some seemingly overly restrictive requirements can be sustained through a "business necessity" argument. The Employer should be prepared to explain and document this business necessity.

The foreign national must show that they meet the minimum requirements for the position. For the most part the individual cannot use any experience gained with the employer filing the application in order to meet those minimum requirements. The only way that the employee could use experience gained with the employer is to establish that the previous experience occurred in a position not "substantially comparable" to the position to be certified. A "substantially comparable" job requires performance of the same job duties greater than 50% of the time.

The next major consideration is the salary to be offered and the ability of the employer to pay that salary. The salary offered must be at least the amount of the DOL's prevailing wage for the position. As your legal representatives, we will conduct a prevailing wage survey with the applicable state workforce agency in order to determine the minimum wage that the employer must offer for the position. The wages are calculated on four levels, with Level 1 as entry level and Level 4 as requiring the most experience. Alternatively, an independent wage source may be used. The wage inserted in the labor certification application must be paid at the time residency is granted. The employer must be prepared to document that it has the ability to pay that salary to the employee at the time of the Labor Certification filing and until residency is granted. This can be done through tax returns, audited financial statements, or annual reports. Employers with 100 or more employees may submit a statement from the company's financial officer in lieu of the other financial documentation.

## **Recruitment**

In the PERM process, the employer conducts its good faith recruiting prior to filing the labor certification. For all labor certification filings an internal job posting must be placed in a conspicuous location at the jobsite for at least ten (10) consecutive business days. That posting should literally track the job duties and requirements from the ETA 9089. Second, the job must be placed in the state job bank for thirty (30) consecutive days and two Sunday newspaper advertisements are required in a newspaper of general circulation. These recruiting steps must occur at least thirty (30) days but not more than one hundred eighty (180) before the filing of the application. The newspaper advertisements must contain the name of the employer, direct applicants to report to or send their resume to the employer, provide a job description specific enough to apprise U.S. workers of the job opportunity and indicate the location of the job clearly enough to demonstrate the relative commuting distance. The advertisements do not need to include the salary and if preferred a wage range can be used as long as the bottom of the range is not lower than the prevailing wage. We will assist in drafting the posting for you, the job bank advertisement and the classified advertisement.

For "professional" jobs, i.e. where a position requires a college or higher degree, the same recruitment requirements apply although an advertisement in an appropriate professional journal may be substituted for the second newspaper advertisement. In addition, at least three of the following ten (10) recruitment methods must be satisfied:

1. Employer's internet site.
2. Job Fair.
3. Job search websites.
4. Private employment agencies.
5. On-Campus recruitment (only for entry level jobs).
6. Trade or profession organization.
7. Employee referral program.
8. Campus placement office postings (only for entry level positions).
9. Local and ethnic newspapers where appropriate.
10. Radio and television advertisements.

The employer must carefully consider all applications that it receives, whether from inside or outside the company. The employee MAY NOT be involved in the actual recruiting process, nor may counsel. The employer should interview, at least by telephone, any seemingly qualified applicants and thoroughly document each interview (date, qualifications, etc.). For those applicants presenting strong credentials, please conduct a personal interview if the telephone interview is insufficient. Please forward copies of all resumes to us so that we have them for the file. You should also send us a brief statement that explains why any applicant is not qualified for the position. At the conclusion of the recruitment period, the employer must prepare a report describing all of its recruitment efforts and its reasons for not hiring each applicant.

The employer will electronically submit the ETA 9089 to the DOL, including a description of the recruitment conducted and the results, the number of hires and those rejected, along with the reasons applicants were not hired. It is essential to have the foreign national's proofs at the outset to be sure they can establish that the minimum requirements for the job are satisfied and proof of the employer's ability to pay the proffered wage. These proofs are filed with the I-140.

The DOL will review the application and current processing time ranges from one month to two years. If approved, the I-140 can then be filed with the Department of Homeland Security. If the DOL denies the application, it can be appealed, re-filed, or reconsideration can be sought. The DOL may request additional information/documentation or they may require supervised recruitment.

## **Let's Get Started**

In order to start the labor certification process, please provide the following documentation:

1. Copies of any advertisements and description of recruitment efforts that have already been done for the position within the last six months. If no ads have been run, please send a proposed advertisement.
2. The company's official job description and requirements (if an H-1 was obtained for this employee, please furnish a copy of the I-129H job description utilized to insure consistency).
3. The employee's education documents, with translation and credentials evaluation, if applicable.
4. Employment confirmation letters for the employee that verify the dates (day/mo./yr.) of all relevant previous employment, job titles held, and a brief job description including special equipment or systems used (e.g., computer applications).
5. A statement of the salary to be offered to the employee.
6. Financial Statement, U.S. tax return or Annual Report of the employer.

Once we have these documents, we will go over the advertising process with you and send you a draft ETA 9089 form to be completed by the employer and the foreign national. We will also send you the in-house posting notice. We look forward to working with you on this

process. If you have any questions or need any additional information, we would be happy to provide it.

**GENERAL TIPS AND PRACTICE POINTERS:**

1. Do not create overly restrictive job requirements.
2. Only use the experience gained by the foreign national prior to the time of hire (presuming the individual is currently employed by the petitioning entity).
3. When using a salary range in lieu of a particular salary be sure that the lowest point of the salary range meets the prevailing wage.
4. Be sure that the employer can prove its ability to pay the prevailing wage at the time of the labor certification filing and until permanent residency is approved.
5. The wage listed in the labor certification is to be paid only at the time that permanent residency is ultimately granted.
6. Employment reference letters need to be detailed, e.g. exact dates of employment, and should be prepared on the letterhead of the employer.
7. Make sure the internal posting remains up for at least 10 consecutive business days.
8. Check the specific vocational preparation (SVP) for the position and determine whether the academic and experiential requirements exceed the SVP. Preferably they should be within the SVP limits. If not, be prepared to establish business necessity.
9. Be sure that all forms are fully executed and dated.
10. The H-1 and the labor certification applications must be consistent.
11. Be reasonable!